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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

City of West Fargo, a political subdivision of the State of North Dakota,

Plaintiff-Appellee

vs.

Mark Alexander McAllister; Alerus Financial, N.A.; and all other persons unknown claiming an estate or interest in or lien or encumbrance upon the real property described in the Complaint, whether as heirs, legatees, devisees, personal representatives, creditors or otherwise,

Defendant-Appellant.

Defendant-~~Appellant.~~ Appellee

Supreme Court No. 20210360

Civil No. 09-2018-CV-02940
(Cass County District Court)

APPELLANTS'S BRIEF
(ORAL ARGUMENT REQUESTED)

APPEAL FROM THE AMENDED JUDGMENT OF CONDEMNATION ENTERED ON DECEMBER 29, 2021, AND UNDERLYING ORDERS, SPECIFICALLY INCLUDING, (A) FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER REGARDING PROPRIETY AND NECESSITY OF TAKING OF JUDGE McCULLOUGH DATED JANUARY 28, 2020, AND (B) ORDER GRANTING PLAINTIFF'S MOTION IN LIMINE AND SUPPLEMENTAL MOTION IN LIMINE OF JUDGE BAILEY DATED NOVEMBER 9, 2020

CASS COUNTY DISTRICT COURT, SOUTHEAST JUDICIAL DISTRICT
HONORABLE SUSAN BAILEY

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[¶3] 2. Did the trial court err in allowing "quick take" for temporary construction easements?

[¶4] 3. Did the trial court err in allowing "quick take" when no special assessment district was involved?

[¶5] 4. Did the trial court err in not granting summary judgment in favor of the landowner based upon the pleadings, statutes, and constitution?

[¶6] 5. Did the trial court err in shifting the burden of proof to the landowner as to the propriety of any "taking"?

[¶7] 6. Did the trial court err in refusing to recognize the need for a special assessment district before "quick take" is authorized?

[¶8] 7. Did the trial court err in granting motion(s) in limine excluding all testimony [landowner and expert witness, and reports "inadmissible"] and argument claiming the sanitary sewer easement obtained by the City of West Fargo had an adverse impact on the landowner's real property?

[¶9] 8. Did the trial court err by preventing landowner from presenting testimony on his theory for severance damages to the jury for its determination, a right recently confirmed in Northern States Power Company by Board of Directors v. Mikkelson, 2020 ND 54, ¶ 7, 940 N.W.2d 308?

[¶10] **STATEMENT OF THE CASE**

[¶11] This appeal involves a judicially-sanctioned trespass concerning installation of two (2) underground sanitary sewer force mains while disguised as a "quick take" eminent domain proceeding wherein "just compensation" was skewed by improper judicial interference with the jury's function.

[¶12] According to the City of West Fargo's ["CITY"] design engineer, Eric Gilbertson, "When we designed this project, (the CITY) did not anticipate having to go through quick take." Transcript of November 1, 2019, page 95; Appendix, 462.

[¶13] On August 8, 2018 – about 30 days before the taking – CITY finally honored N.D.C.C. § 54-12-01.2 giving notice of the Attorney General's "website providing information to landowners who may be impacted by eminent domain." Exhibit P-17; Doc ID #77; Tr. of 11/1/2019, ps. 131-132. On August 20, 2018, CITY illegally passed a Resolution of Offer to Purchase LANDOWNER'S property for $36,000. App., p. 34. The Resolution of Offer to Purchase was illegally done while CITY'S governing body was in executive session. Tr. of 11/1/2019, ps. 135-137.

[¶14] Instead of serving a normal action in eminent domain, the City of West Fargo ["CITY"] filed a flawed "Complaint (Quick Take Eminent Domain)" dated September 5, 2018 [App., p. 14] intending to "quick take" two (2) easements: (A) a "Permanent Property Easement" thirty-five (35') feet in width ("The north 35.00 feet of the south 75.00 feet of said AUDITOR'S LOT NUMBER 3 ..."); and (B) a "Temporary Easement Property" ("The south 40.00 feet of said AUDITOR'S LOT NUMBER 3 ..."). Both easements involve land owned

by Mark Alexander McAllister ["LANDOWNER"]. CITY simultaneously deposited $36,000.00 with the Clerk of the District Court. Docket Entries #6, #9.

[¶15] LANDOWNER timely served an Answer and/or Notice of Appeal & Demand for Jury Trial dated September 7, 2018, objecting to the taking, and requesting jury trial to establish just compensation. App., ps. 35-45.

[¶16] Contemporaneously, CITY initiated "quick take" actions against four (4) other rural landowners [Engebretsons; Landblom Trust; Miller; and Querns]. As a result of a Motion to Consolidate, partially stipulated to by the five (5) different landowners, an Order Regarding Consolidation was issued by Judge Susan Bailey on May 28, 2019, so that "any and all issues incidental to the trial on the issue of the propriety and necessity for the taking .." would be presided over by Judge Steven E. McCullough. App., p. 46.

[¶17] After consolidation, LANDOWNER (and the other landowners) sought partial summary judgment which was considered as part of a later bench trial. The Motion for Partial Summary Judgment, applicable to Phase I of all five (5) quick take actions by the order(s) of consolidation, was docketed in the Miller case (09-2018-CV-02939) where Judge McCullough was originally assigned as Doc ID#s 80-83. The docket entries relating to the motion for partial summary judgment were filed in this action by stipulation of the parties, and court order. Doc ID# 281 & 283; 284.

[¶18] Following bench trial on November 1, 2019, Judge McCullough issued Findings of Fact, Conclusions of Law and Order Regarding Propriety and Necessity of Taking dated January 28, 2020. App., ps. 145-161. Judge McCullough denied LANDOWNER'S

requested partial summary judgment relief, and determined CITY'S "immediate acquisition of the property interests in (the five consolidated) cases for the purpose of Sewer Improvement Project No. 1308 via quick take is authorized and approved." App., p. 160. The matter was remanded back to Judge Bailey for "any and all ongoing matters." App., p. 161.

[¶19] The jury trial for determination of "just compensation" was scheduled for September 15, 2020. See entry after Docket Entry #141; App., p. 9. On August 14, 2020, CITY made a Motion in Limine seeking "an order excluding testimony from the defendant claiming the sanitary sewer easement obtained by the City of West Fargo .. has caused his property to become nonconforming with West Fargo City ordinances." App., p. 167. Subsequently, CITY filed a Supplemental Motion in Limine dated September 18, 2020 [App., p. 217] seeking "an order excluding testimony and argument claiming the sanitary sewer easement obtained by the City of West Fargo ... has an impact on the front yard setback requirements found in Section 4-421.4(f) of the West Fargo City Ordinances." Despite LANDOWNER'S objections and argument [App., ps. 175-216; App., ps. 243-253], Judge Bailey issued an Order Granting Plaintiff's Motion in Limine and Supplemental Motion in Limine dated November 9, 2020, immediately prior to the re-scheduled November 17, 2020, jury trial which granted both motions, and determined "(a)ll testimony and argument claiming the sanitary sewer easement obtained by the City .. has an impact on the front yard setback requirement found in Section 4-421.4(f) of the West Fargo City ordinances is excluded and inadmissible at trial."

[¶20] CITY and LANDOWNER stipulated that both "parties believe the effect of the Order Granting Plaintiff's Motion in Limine and Supplemental Motion in Limine on November 9, 2020, decimates the landowner's factual presentation, to include his expert's appraisal with respect to severance damages, and will dictate a jury award of $36,000 – the amount deposited by the City of West Fargo". App., p. 263. After stipulating the deposition testimony of LANDOWNER and appraiser expert Gerald (Gary) E.E. Bock, and exhibits, be made part of the record, CITY and LANDOWNER further stipulated that the presumed jury verdict of $36,000.00 be entered so that LANDOWNER'S appeal could occur from the presumed jury award, but reserving to a later date, any amounts to be awarded by the District Court for LANDOWNER'S costs and disbursements, to include attorney's fees and appraisal expenses. App., ps. 262-265. The Stipulation also contemplated issuance of a Rule 54(b) Order, and that LANDOWNER be permitted to timely appeal from "the entered Judgment and the propriety of the underlying orders issued by Judge McCullough and/or Judge Bailey to the North Dakota Supreme Court as allowed by law." App., p. 264.

[¶21] Following hearing involving Judge Bailey, an Order For Judgment of Condemnation dated November 20, 2020, was executed by the District Judge [App., ps. 266-269], a Rule 54(b) Order was simultaneously issued by Judge Bailey, and a Judgment of Condemnation was issued by the Clerk of the District Court on November 23, 2020. App., ps. 270-273.

[¶22] LANDOWNER timely electronically filed a Notice of Appeal with the North Dakota Supreme Court on November 30, 2020. App., p. 470. The North Dakota Supreme Court, in City of West Fargo v. McAllister, 2021 ND 136, ¶ 13, 962 N.W.2d 591, did not reach the

merits of the appeal, and dismissed the appeal for the reason "the district court abused its discretion by inappropriately certifying the condemnation judgment as final under N.D.R.Civ.P. 54(b)."

[¶23] After remand, on December 20, 2021, the District Court disposed of all undecided issues by issuing an Order Granting (LANDOWNER'S) Motion for Attorney Fees in the amount of $25,708. Doc. #319. All underlying issues having been addressed, the Clerk of the District Court issued an Amended Judgment of Condemnation on December 29, 2021. App., p. 473.

[¶24] LANDOWNER timely electronically filed a Notice of Appeal with the North Dakota Supreme Court on December 30, 2021. App., p. 477.

[¶25] **STATEMENT OF FACTS**

[¶26] LANDOWNER owns Auditor's Lot Three (3) in the Southeast Quarter (SE¼) of Section Thirty (30) in Township One Hundred Forty (140) North of Range Forty-nine (49) West of the Fifth Principal Meridian, Cass County, North Dakota, a rural residential property located north of a Reed Township road known as 19th Avenue North, and immediately adjacent to West Fargo, North Dakota. LANDOWNER'S expert appraiser opines Auditor's Lot Three has a fair market value of $485,000.00 before any easement acquisition. App., p. 279; 332. LANDOWNER testified that the fair market value for his 10+ acre rural farmstead before the project was $600,000. Deposition Transcript; Doc. ID #175; ps. 19; 66; 95; App., p. 399, 407, 427.

[¶27] On August 21, 2017, CITY deemed "it is necessary to establish a sewer improvement

district **within** the said City of West Fargo" and created "Sewer Improvement Project No. 1308 of the City of West Fargo" [App., p. 49; **emphasis** added] for the construction of a sanitary sewer forcemain and lift station upgrades for the conveyance of sewage [App., p. 14]. LANDOWNER, whose property is *outside* the city limits, is not capable of accessing the sanitary sewer forcemain – Project No. 1308 provides no benefit to LANDOWNER.

[¶28] CITY has not created any *special assessment district* to pay any aspect of costs associated with "Sewer Improvement Project No. 1308 of the City of West Fargo". CITY'S admitted evidence, and CITY'S discovery responses (also admitted in Judge McCullough's proceedings) never revealed the creation of a *special assessment district* authorized by N.D.C.C. Chapter 40-22 [entitled "Improvements by Special Assessment Method"], a North Dakota constitutional requirement for any exercise of "quick take". Specifically, App., ps. 49-144. See Point 1(B)(1).

[¶29] The northern boundary of the permanent easement is 75' north of LANDOWNER'S property line. CITY identified the reason the permanent easement's location was at a substantial distance from the section line [75' north of section line/property line], as follows [App., p. 81]:

> ANSWER/RESPONSE NO. 6: It is anticipated 19th Avenue North will be improved in the future. Such improvement will require expansion of the road surface, and replacing the existing road with a hard-surface road. The engineers for the City of West Fargo have recommended placement of the sanitary sewer lines outside of the area where a road will likely be cited (sic) in the future to avoid conflicts with the future construction of the road and to ensure maintenance of the sanitary sewer line is as easy as possible now and in the future. The City of West Fargo accepted the recommendation of its engineers. Investigation and discovery continue with respect to documents related to the placement of right of way as designed.

[¶30] CITY'S engineer [Dustin Scott] testified the location of the sanitary sewer forcemains were part of the "due diligence" design with the idea of "19th Avenue (being a) major arterial roadway through the FM area. Anticipating the need for urbanizing that corridor was brought into our planning efforts of the sewer main placement." Tr. of 11/1/2019, ps. 41, 48-49, 50-51; App., ps. 437, 444-445, 446-447 (easement location in anticipation of future roads). CITY'S engineer knew LANDOWNER'S property (and the other landowners' property) was outside of the city limits of West Fargo. Tr. of 11/1/2019, p. 43; App., p. 439.

[¶31] CITY'S design engineer [Eric Gilbertson] testified the easement was located north of 19th Avenue because "less structures that were going to be impacted. And as – you know, through the process, what we found with the appraisals and stuff was **having a force main in somebody's front yard right near their house devalued it** to the portion where we had to purchase one house on the north side." **Emphasis** added; Tr. of 11/1/2019, p. 63; App., p. 450. This point was repeated at page 66 [App., p. 453] when CITY'S design engineer recognized the effect of the location of such an easement – "basically it devalued the property to the point where purchase was required." Design engineer Gilbertson also conceded the "actual corridor" for the route had been determined in the fall of 2017 (Tr. of 11/1/2019, p. 65. App., p. 452), and that even before the Resolution of Necessity dated March 5, 2018, CITY had the ability to identify the necessary right of way. Tr. of 11/1/2019, p. 71; App. 455. Design engineer Gilbertson elaborated, and noted the easement was located because "19th Avenue, although it is a gravel road right now, does have the potential to turn into a principle (sic) – I guess you'd call it an arterial or maybe a principle (sic) collector for the

City of West Fargo." Tr. of 11/1/2019, p. 74; App. p. 458. When pressed, design engineer Gilbertson testified:

> Q (By Mr. Garaas) But the decision was made to locate the pipes, two different pipes, some 75 feet away from the section line because of a nonexistent future road.
>
> A The pipes are laid about 65 feet from said section line, but the easement does extend to 75. And, as engineers, our job is to plan out for the future and that's where this location was placed.
>
> Q But that means that when you plan for the future there was no road that was being constructed, correct?
>
> A There is no road being constructed right now. Correct.
>
> ...
>
> THE WITNESS: As I said, if we did not plan for the future and were just doing this as a one-time project, believing that 19th would never be improved going into the future, we could have placed the force main closer to the road.

[¶32] CITY has exercised its extra-territorial zoning authority. N.D.C.C. § 40-47-01.1. LANDOWNER filed CITY'S 281 pages of ordinances entitled "TITLE IV. PLANNING - ZONING" as Exhibit E in his opposition to the motion in limine. Doc ID #s 160 & 161. Applicability of CITY'S ordinances is a "fact" to be determined by the jury. When establishing "just compensation", LANDOWNER and his expert appraiser each recognized CITY'S authority as expressed in TITLE IV – the "location" of the easement, and any other proposed infrastructure, including arterial roads, devalues LANDOWNER'S residential property, perhaps echoing design engineer Gilbertson's statement: "(H)aving a force main in somebody's front yard right near their house devalue(s) it .." See, ¶ 31, above.

[¶33] Prior to the project, LANDOWNER'S property was compliant with CITY'S ordinances. After the project, LANDOWNER'S property was not compliant with TITLE IV

– the personal residence, and some other structures are too close to the right of way. The location of the easements would cause the dwelling, and other structures, to violate front yard setback requirements imposed by CITY – prospective purchasers will not want either forcemains or roads in their front yards.

[¶34] LANDOWNER'S property is zoned as "A" District or Agricultural District, and the requirements are set forth in Section 4-421. App., ps. 191-194. The "Yard Requirements" set forth in Section 4-421.4 existed at the time of taking Landowner's land, and include subsection f's specified "Minimum Front Yard", along with footnote #2 indicating definite words of instruction – "Whichever requires the greater setback." (App., p. 194):

f.	Minimum Front Yard: -	Local: 120' from centerline or 40' from the established right-of-way, whichever is greater.
	-	Collector: 150' from centerline or 75' from the established right-of-way, whichever is greater.
	-	Arterial: 150' from centerline or 75' from the established right-of-way, whichever is greater.

[¶35] After the "right of way" is taken (already wrongfully taken by "quick take"), LANDOWNER'S existing "dwelling will no longer comply with zoning for setback and it becomes a legally non-conforming use" according to expert appraiser Bock, relying upon the Appraisal Institute's *The Dictionary of Real Estate Appraisal,* 6th ed., definition for "legally non-conforming use" (Chicago Appraisal Institute, 2015). Appraiser Bock noted the obvious effect(s) on the underlying land value, site improvements, and dwelling ["Appraisal of the Property in the After Condition - App.,ps. 333-347]: "The effect of this is that the marketability of the property will likely be affected. Legally non-conforming uses typically sell at a discount to those that are not otherwise encumbered." App., p. 339. Expert

Appraiser Bock testified the property, after the easement, had a market value of only $245,000 (down from the $485,000 "before" fair market value), so LANDOWNER should have been paid "just compensation" damages in eminent domain proceedings, as follows:

LANDOWNER'S Damages from view of appraiser - App., p. 280		
Description	Amount	Source - Appendix location
Value of Permanent Easement Acquired	$5,800.00	Land value by area $6,500.00 – loss of 90% use of land which "establishes a new right of way line for the subject property" = $5,850 rounded to $5,800 (App., p. 342) Permanent easement is an "(i)mpediment to future use or development and would affect existing building setbacks." (App., p. 342)
Value of Temporary Easement Acquired	1,248.00	App., p. 343
Severance Damage to the building improvements	$242,000.00	App., ps. 343-346. "40-50% discount to the before value of the building improvements." App., p. 344.
Tabulation total	$250,000.00	App., p. 347

[¶36] LANDOWNER, also a Reed Township supervisor, was familiar with land sales and tax assessments, and was also recognized by CITY'S attorney to be "the one that – that is competent and qualified to testify as to (the) value of (his) property", gave deposition testimony that "just compensation" would be a total of $300,000. App., ps. 406 (as to quote); 424.

[¶37] LANDOWNER further testified that Exhibit 6 [Doc ID #195; App., p. 469] showed his dwelling's present location (but excluding the 7' porch area, a/k/a breakfast nook-y) with

reference to the section line (104.05' + 33' = 137.05'), existing street centerline (151.46'), and the forcemain easement line (62.02'). App., ps. 412-413. As a result of the forcemain easement boundary line, his dwelling would be non-compliant, and incapable of being rebuilt. App., p. 407-412. The location of the forcemain, and the contemplated arterial road devalued LANDOWNER'S real property so that "just compensation" needs to be determined by jury verdict, not by judge.

[¶38] **LAW AND ARGUMENT**

[¶39] **Standard of Review & Oral Argument**

[¶40] The North Dakota Supreme Court applies a de novo standard of review for questions of law. Bertsch v. Bertsch, 2006 ND 31, ¶ 6, 710 N.W.2d 113. Oral argument is requested to discuss the interaction of facts and law.

[¶41] **POINT 1. CITY is not entitled to "quick take" - there exists a constitutional hurdle, and resulting statutory pleading requirements.**

[¶42] North Dakota Constitution, Article 1, § 16 is quite exact (*emphasis* added):

> Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner, unless the owner chooses to accept annual payments as may be provided for by law. No right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money or ascertained and paid into court for the owner, unless the owner chooses annual payments as may be provided by law, irrespective of any benefit from any improvement proposed by such corporation. Compensation shall be ascertained by a jury, unless a jury be waived. *When the state or any of its departments, agencies or political subdivisions seeks to acquire right of way, it may take possession upon making an offer to purchase and by depositing the amount of such offer with the clerk of the district court of the county wherein the right of way is located.* The clerk shall immediately notify the owner of such deposit. The owner may thereupon appeal to the court in the manner provided by law, and

> may have a jury trial, unless a jury be waived, to determine the damages, which damages the owner may choose to accept in annual payments as may be provided for by law. Annual payments shall not be subject to escalator clauses but may be supplemented by interest earned.
>
> For purposes of this section, a public use or a public purpose does not include public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health. Private property shall not be taken for the use of, or ownership by, any private individual or entity, unless that property is necessary for conducting a common carrier or utility business.

[¶43] **A. Quick take authorization is limited to a highway "right of way".**

[¶44] In that North Dakota's Constitution restricts "quick take" to right of way, the definition of "right of way" become important. The North Dakota Supreme Court has determined what such term means in Tormaschy v. Hjelle, 210 N.W.2d 100, 102 (N.D. 1973) when construing the same language earlier identified as Article I, § 14 as amended in 1956 – it is restricted to highway purposes (and incidental uses):

> A rule of constitutional and statutory construction is that words are to be given their plain, ordinary and commonly understood meaning. *Verry v. Trenbeath*, 148 N.W.2d 567, 574 (N.D.1967).
>
> Webster's Dictionary defines right-of-way as a 'right of passage over another person's ground'.
>
> It is true that the Legislature had defined 'right of way' as early as 1953 as 'a general term denoting land, property, or interest therein, usually in a strip, acquired for or devoted to a highway.' S.L.1953, Ch. 177, Section 2, Subsection 37.[1]

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[1] The current version of the cited Session Law defining "right of way" is found at N.D.C.C. § 24-01-01.1(38) – again, related to highways:

> 38. "Right of way" means a general term denoting land, property, or interest therein, acquired for or devoted to highway purposes and shall include, but

> We do not believe, however, that restricting the meaning of 'right of way' to highway purposes excludes the taking of land for a sewage lagoon in connection with a highway rest area.
>
> The Tormaschy decision concludes, at page 103:
>
> Giving the term 'right of way' the broad meaning attributed to the term 'roadway', we conclude that the term 'right of way' in Section 14 of the North Dakota Constitution as amended in 1956 was meant to include not only that strip of land necessary for driving lanes, but also other land necessary for the construction of accommodations reasonably necessary to make driving safe, comfortable, and helpful.

[¶45] Consistent with such Tormaschy decision is the more recent decision of Berger v. Town of New Denmark, 310 N.W.2d 833, 837 (Wis.App. 2013): "A right of way, 'in its strict meaning, is the right of passage over another man's ground,' .. "

[¶46] The 1973 Tormaschy decision was recently favorably cited in Owego Township v. Pfingsten, 2018 ND 68, ¶ 25, 908 N.W.2d 123, another road right of way eminent domain proceeding which explains how the 1956 constitutional amendment had "removed 'the limitation imposed by judicial construction on the authority of the Legislature to enact quick take statutes if the Legislature chose to do so.' (citation omitted) Thus, quick take became an alternative to traditional taking when the Legislature specifically provided for such action." Citing Johnson v. Wells County Water Resource Board, 410 N.W.2d 525, 528

> not be limited to publicly owned and controlled rest and recreation areas, sanitary facilities reasonably necessary to accommodate the traveling public, and tracts of land necessary for the restoration, preservation, and enhancement of scenic beauty adjacent to the state highway system.

(N.D. 1987). Simply put, the "right of way" referenced in the North Dakota Constitution pertinent herein relates to the "public's" right of passage over LANDOWNER'S ground(s) – there is no possible way that members of the public can obtain passage *under* the ground.

[¶47] Further, CITY'S intended use involves more than mere "passage over" LANDOWNER'S ground. CITY intended to place permanent pipes, and/or other structures under [and/or upon] the LANDOWNER'S land. The North Dakota Supreme Court has already determined the words "right of way" have such "plain, ordinary and commonly understood meaning", as set forth in the Tormaschy decision, at page 102 – relating to roadways – not underground sanitary sewer forcemains inaccessible to LANDOWNER'S use. If the use of quick take is now judicially sanctioned as being part of a constitutionally defined highway/road "right of way" easement in Phase I of the action, then it must likewise be so designated as a highway/road "right of way" in Phase II – the jury trial. If this taking is authorized, then Judge Bailey has to be reversed for ignoring the adverse effect of any "right of way". In Phase I, Judge McCullough erred in three (3) respects – (a) the necessary road construction component was missing, (b) there was no special assessment district created for any construction – a predicate for any municipal quick take, and (c) the burden of proof should always rest on the CITY – it must prove it is legally entitled to "quick take" eminent domain.

[¶48] **B. The "quick take" authorization, found within Article 1, § 16 of the North Dakota Constitution, is not self-executing.**

[¶49] Please note the requirement that the Legislature must specifically provide for quick

take action by any political subdivision. The North Dakota Supreme Court has previously ruled "(t)he 'quick take' authorization in N.D. Const. art. I, § 16 is not self-executing, and legislation is necessary to effectuate the quick take authority", citing Johnson, at pages 529-530. See specifically, Eberts v. Billings County Bd. of Com'rs, 2005 ND 85, ¶ 10, 695 N.W.2d 691.[2]

[¶50] LANDOWNER does not argue that CITY does not have eminent domain authority, but does assert that CITY is not authorized to use "quick take" with respect to this sanitary sewer project. North Dakota's Legislative Assembly has not granted municipalities the unlimited right of quick take, and indeed, some legal controversy is most-assured should any municipality attempt to utilize it for anything other a public use associated with a road/highway "right of way". As above noted, the North Dakota Supreme Court has already determined the words "right of way" have such "plain, ordinary and commonly understood meaning", as set forth in the Tormaschy decision, at page 102 – roadways only, and *not involving underground sanitary sewer forcemain pipes.*

[¶51] **1. There is no special assessment project – unless there exists a special assessment project, the non-self-executing constitutional provision lies useless.**

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[2] The undersigned is aware that "right of way" is a phrase referenced in certain North Dakota statutes associated with creation of proposed drains or other water projects, which would be somewhat consistent with the Webster's Dictionary definition for right-of-way as a "right of passage over another person's ground". Quick take eminent domain by water resource boards is limited to those projects involving federal or state funds, and recently enacted procedures/time lines rather rigid as to nature and terms. See specifically, N.D.C.C. § 61-16.1-09(2).

[¶52] Specifically as to municipalities, no known North Dakota statute allows CITY to use quick take – there is *no special assessment project*, nor any improvement sought under authority of N.D.C.C. Chap. 40-22, all required by statute for any attempted exercise of quick take, and presumptively, only permissible if done as part of a roadway project. CITY, and the lower courts, fail to understand that North Dakota's statutes allowing for special assessments always require two (2) primary components: (a) a *future* project (if the improvement already exists, there never can be a "need" for the project), and (b) the requirement that some portion of the *future* project be funded by the "benefitted" landowners through a statutory assessment process. N.D.C.C. Chapter 40-22. See specifically, N.D.C.C. § 40-22-05 which may allow for quick take – but only if there first exists a valid special assessment project authorized by N.D.C.C. Chap. 40-22, entitled "Improvements by Special Assessment Method". The statute specifically reads, with parts *emphasized* by LANDOWNER:

> *Whenever property required to make any improvement authorized by this chapter is to be taken by condemnation proceedings*, the court, upon request by resolution of the governing body of the municipality making such improvement, shall call a special term of court for the trial of the proceedings and may summon a jury for the trial whenever necessary. The proceedings shall be instituted and prosecuted in accordance with the provisions of chapter 32-15, except that *when the interest sought to be acquired is a right of way* for the opening, laying out, widening, or enlargement of any street, highway, avenue, boulevard, or alley in the municipality, or *for the laying of any* main, *pipe*, ditch, canal, aqueduct, or flume *for conducting* water, storm water, or *sewage, whether within or without the municipality, the municipality may make an offer to purchase the right of way and may deposit the amount of the offer with the clerk of the district court of the county wherein the right of way is located, and may thereupon take possession of the right of way forthwith.* The offer shall be made by resolution of the governing body of the municipality, a copy of which shall be attached to the

complaint filed with said clerk of court in accordance with section 32-15-18. The clerk shall immediately notify the owner or owners of the land wherein the right of way is located of the deposit, by causing a notice to be appended to the summons when served and published in said proceedings as provided in the North Dakota Rules of Civil Procedure, stating the amount deposited or agreed in the resolution to be deposited. The owner may thereupon appeal to the court by filing an answer to the complaint in the manner provided in the North Dakota Rules of Civil Procedure, and may have a jury trial, unless a jury be waived, to determine the damages. However, upon due proof of the service of said notice and summons and upon deposit of the aggregate sum agreed in said resolution, the court may without further notice make and enter an order determining the municipality to be entitled to take immediate possession of the right of way. If under laws of the United States proceedings for the acquisition of any right of way are required to be instituted in or removed to a federal court, the proceedings may be taken in that court in the same manner and with the same effect as provided in this section and the clerk of the district court of the county in which the right of way is located shall perform any and all of the duties set forth in this section, if directed to do so by the federal court. The proceedings shall be determined as speedily as practicable. An appeal from a judgment in the condemnation proceedings shall be taken within sixty days after the entry of the judgment, and the appeal shall be given preference by the supreme court over all other civil cases except election contests. No final judgment in the condemnation proceedings awarding damages to property used by a municipality for street, sewer, or other purposes shall be vacated or set aside if the municipality shall pay to the defendant, or shall pay into court for the defendant, in cash, the amount so awarded. The municipality may levy special assessments to pay all or any part of the judgment and at the time of the next annual tax levy may levy a general tax for the payment of the part of the judgment as is not to be paid by special assessment. For the purpose of providing funds for the payment of the judgment, or for the deposit of the amount offered for purchase of a right of way as provided above, the municipality may issue warrants on the fund of the improvement district as provided in section 40-24-19, in anticipation of the levy and collection of special assessments and of any taxes or revenues to be appropriated to the fund in accordance with the provisions of this title. The warrants may be issued upon the commencement of the condemnation proceedings or at any time thereafter. Upon the failure of the municipality to make payment in accordance with this section, the judgment in the condemnation proceedings may be vacated.

[¶53] The North Dakota Supreme Court has ruled that "(a) grant of power to a

governmental subdivision to exercise the right of eminent domain should be strictly construed" in Sheridan County v. Davis, 240 N.W. 867, 868 (N.D. 1932). Simply put, no quick take authority exists because the North Dakota Legislative Assembly only allows for such possibility if there first exists a *special assessment improvement project*, and presumptively only then if there also exists a roadway project (which may also involve simultaneous installation of sewer/water pipes). Temporary construction easements do not count.

[¶54] The rationale for such limitation should be readily apparent – North Dakota only allows quick take eminent domain if there also exists a special assessment district wherein the landowners specially benefit from the right of way improvement – no benefit to LANDOWNER exists, nor was there a special assessment district even created.

[¶55] **2. There is no right to quick take for temporary construction easements.**

[¶56] CITY'S deposit included an amount for a temporary construction easement over LANDOWNERS' grounds. There is no statutory authority for CITY to use "quick take" to obtain temporary construction easements – only the possibility of a "right-of-way" can be taken by the quick take method – provided all other eminent domain statutes are honored. CITY'S use of the district court to authorize a temporary trespass upon LANDOWNER'S property should be condemned – a judicially-sanctioned improper quick take and trespass has occurred, repugnant to two (2) Constitutions. As noted by Justice Kennedy in *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 737, 130 S. Ct. 2592, 2615,

177 L. Ed. 2d 184 (2010) [a decision where a majority of the justices accepted Justice Scalia's proposition that it is appropriate to "set(..) aside judicial decisions that take private property"; *id.*, page 720]:

> The Court would be on strong footing in ruling that a judicial decision that eliminates or substantially changes established property rights, which are a legitimate expectation of the owner, is "arbitrary or irrational" under the Due Process Clause. *Lingle*, 544 U.S., at 542, 125 S.Ct. 2074; see id., at 548–549, 125 S.Ct. 2074 (KENNEDY, J., concurring); see also *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) (" '[P]roperty' " interests protected by the Due Process Clauses are those "that are secured by 'existing rules or understandings' " (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972))). Thus, without a judicial takings doctrine, the Due Process Clause would likely prevent a State from doing "by judicial decree what the Takings Clause forbids it to do by legislative fiat." *Ante*, at 2601.

[¶57] The district court should have determined the temporary easement was a trespass, not capable of being the subject of "quick take", nor could it be judicially sanctioned.

[¶58] **C. CITY should have negotiated first.**

[¶59] By statute, CITY is required to negotiate in good faith: "A condemnor shall make every reasonable and diligent effort to acquire property by negotiation." N.D.C.C. § 32-15-06.1(1). CITY pre-determined the right of way, ignored landowner attempts to request the sanitary sewer forcemain be located under the existing township road, went into executive session and illegally passed a resolution using "quick take" to avoid all landowner negotiations in order to improperly locate the right of way for the sanitary sewer forcemain and future road at least seventy-five (75') feet away from the section line. CITY did not even try to go through the statutorily-mandated effort of timely negotiation – bulldozers were at the ready.

[¶60] **D. There exists a statutory pleading requirement that precludes CITY'S "quick take" action.**

[¶61] Most of the pertinent laws relating to proper exercise of eminent domain are codified in N.D.C.C. Chapter 32-15. Specific to this action against LANDOWNERS, N.D.C.C. § 32-15-18 prevents any approval of CITY'S action – its Complaint is fatally flawed (*emphasis* added):

> **N.D.C.C. § 32-15-18. What complaint must contain**
>
> *The complaint must contain*:
>
> 1. The name of the corporation, association, commission, or person in charge of the public use for which the property is sought, who must be styled plaintiff.
>
> 2. The names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants.
>
> 3. A statement of the right of the plaintiff.
>
> *4. If a right of way is sought, the complaint must show the location, general route, and termini, and must be accompanied with a map thereof so far as the same is involved in the action or proceeding.*
>
> 5. A description of each piece of land sought to be taken and whether the same includes the whole or only a part of an entire parcel or tract.

[¶62] See also, Otter Tail Power Co. v. Demchuk, 314 N.W.2d 298, 301 (N.D. 1982) ("A complaint in eminent domain proceedings must, with accuracy and certainty, describe and include a map of the right-of-way sought as to (1) location, (2) general route, (3) termini, and (4) legal description of each piece of land sought. Section 32-15-18 (4) and (5), NDCC; *Otter Tail Power Co. v. Von Bank*, 72 N.D. 497, 8 N.W.2d 599, 145 A.L.R. 1343 (1943); 7

A.L.R.2d 381.").

[¶63] The Complaint [App., ps. 14-34] is fatally defective because only "right of way" can constitutionally be the subject of quick take (never temporary construction easements), and CITY has failed (a) to identify a current road project allowing for right of way [see Point 1(A)], (b) to plead "the location, general route, and termini" of the right of way, and (c) to attach "a map thereof so far as the same is involved in the action .." The lower court ignored the statutory predicates, including statutory pleading requirements, and failed to protect LANDOWNER from an unauthorized taking – no quick take was authorized by law because no road-related special assessment project existed (conferring benefit upon LANDOWNER), and also, no temporary construction easement can ever be taken by quick take – our North Dakota Constitution forbids (or does not countenance) such a taking.

[¶64] **POINT 2. LANDOWNER is entitled to provide testimony as to "just compensation" for determination by the jury, not judge.**

[¶65] As indicated above, Phase I of this eminent domain action has resulted in an erroneous decision with Judge McCullough approving the acquisition of the right of way (and other lands) by quick take, thereby allowing for the jury determination of "just compensation" under N.D.C.C. Chapter 32-15 ["Phase II"]. The "taking" was judicially approved by Judge McCullough, and the only issue then remaining related to the jury's determination of "just compensation" – but the district judge allowed the evidence to be skewed.

[¶66] CITY sought to limit LANDOWNER'S testimony, and the testimony of his expert

appraiser; the lower court issued its order excluding any testimony or argument claiming the sanitary sewer easement had any impact on the front yard setback requirements found in Section 4-421.4(f) of CITY'S ordinances. App., ps. 258-261. The lower court's order is legally and factually flawed, and beyond the authority of the court – questions of fact are reserved to the jury.

[¶67] **A. LANDOWNER has the right to present testimony as to his theory of the value of the land taken, or impacted.**

[¶68] The North Dakota Supreme Court recently emphasized the right of the landowner to testify about severance damages, which are measured by the depreciation in value to the property not taken, in Northern States Power Company by Board of Directors v. Mikkelson, 2020 ND 54, ¶ 7, 940 N.W.2d 308:

> [¶7] "Private property shall not be taken or damaged for public use without just compensation ...." N.D. Const. art. I, § 16. When a taking occurs, the property owner is entitled to be paid the fair market value for property that has been taken. *City of Devils Lake v. Davis*, 480 N.W.2d 720, 725 (N.D. 1992). The owner also is entitled to severance damages, which are measured by the depreciation in value to the property not taken. *City of Hazelton v. Daugherty*, 275 N.W.2d 624, 628 (N.D. 1979). The determination of damages caused by a taking is a fact question that "shall be ascertained by a jury, unless a jury be waived." N.D. Const. art. I, § 16; *see also* N.D.C.C. § 32-15-01(1) ("A determination of the compensation must be made by a jury, unless a jury is waived."). The party claiming damages in a condemnation proceeding generally has the burden of proof to establish the amount. *Lenertz v. City of Minot*, 2019 ND 53, ¶ 22, 923 N.W.2d 479; *Cass Cnty. Joint Water Res. Dist. v. Erickson*, 2018 ND 228, ¶ 12, 918 N.W.2d 371.

At ¶ 11 of the Mikkelson decision, the Supreme Court recognized the right of the landowner to present testimony on their theory for severance damages:

> Rather, the Mikkelson's theory for damages is that the acreage burdened by

> the easement has no value and that amount of diminution "taken across the whole of the Subject Property" yields the fair market value after the taking. This is consistent with the proper measure of damages for a partial taking, "which is the difference in the market value of the property not taken before and after the severance from the part taken." *Daugherty*, 275 N.W.2d at 628.

Even Justice Tufte's dissent recognized, at ¶18:

> The owner of land made the subject of a condemnation proceeding may claim damages in the form of just compensation for the value of the land taken, and may also claim severance damages for a reduction in value for the remainder of a parcel not taken. *City of Grand Forks v. Hendon/DDRC/BP*, 2006 ND 116, ¶ 9, 715 N.W.2d 145 (citing N.D.C.C. § 32-15-22(2)). "Damage to the property not taken is not presumed, and the owner has the burden of proof to show that the condemnation has reduced the value of the property not taken." *Id.* at ¶ 10.

[¶69] Evidence as to the location of the sanitary sewer forcemain easement designed to take into account CITY'S planned 19th Avenue's setback of 150' [including this 75' easement] is critical to determining severance damages. Even if CITY limits itself to only a 75' right of way so that the sanitary sewer forcemain easement lies underneath the north 35' of the right of way – there will be CITY infrastructure adversely impacting the value of LANDOWNER'S property. "Location, location, location" – nobody wants pipelines or roads on their property.

[¶70] LANDOWNER is entitled to severance damages due to the diminished value of his property, now non-compliant with CITY'S zoning and building laws. It is a jury question – a factual question only within the province of the jury to determine – as to whether the CITY'S ordinances adversely impact LANDOWNER – from the view of a willing buyer/willing seller, and not from the view of a judge. The lower court is without jurisdiction to intrude upon the factual question presented by CITY'S ordinances, or the

future road to be constructed with its mandated 150' right of way, and possible additional setback. CITY'S ordinances are foreign law, all of which the Court apparently took judicial notice. Joyce v. Joyce, 2020 ND 75, 941 N.W.2d 546. The "effect" of setback ordinances, are a "fact" to be determined by the jury. The "effect" of a prospective road, are a "fact" to be determined by the jury. The lower court intruded upon a jury issue by limiting LANDOWNER'S evidence.

[¶71] **B. CITY'S zoning ordinance requirements and prospective road create the possibility of severance damages.**

[¶72] The origin of the golden rule of real estate – "location, location, location" – is probably lost to history, but it is still periodically cited. Enron Federal Solutions, Inc. v. U.S., 80 Fed. Cl. 382, 394 (2008). LANDOWNER'S piece of heaven was devalued by improper placement of a sanitary sewer forcemain deep into LANDOWNER'S property so as to accommodate a future roadway always requiring a 150' right of way.

[¶73] As to LANDOWNER'S property, the CITY unilaterally decided to condemn a thirty-five (35') foot wide strip of land for construction, operation, and maintenance of two (2) sanitary sewer pipelines underground up to 75' north of LANDOWNER'S southern property line. The CITY ignored land already subject to public access under N.D.C.C. § 24-07-03, instead taking land up to 75' north of the section line, well into LANDOWNER'S property and creating a long rectangular tract coveted by the CITY, and effectively lost to LANDOWNER.

[¶74] West Fargo's zoning ordinances include definitions established by ordinances, and

rules of usage. Section 4-0402.1(A) provides that "(w)ords within these regulations shall be used, interpreted, and defined as presented in this chapter." Under Section 4-0402.1(F), "(i)n the event of conflicting provisions in the meanings of any words in these regulations, **the most restrictive or that which imposes a higher standard shall govern.**" **Emphasis** added. The "word 'shall' is mandatory ..." Section 4-0402.1(C). App., p. 184.

[¶75] Unfortunately, the lower court ignored elementary rules relating to judicial interpretation. LANDOWNER notes the existence of N.D.C.C. § 1-01-9 which states, "(w)henever the meaning of a word or phrase is defined in any statute, such definition is applicable to the same word or phrase wherever it occurs in the same or subsequent statutes, except when a contrary intention plainly appears." Ordinances should be similarly construed - "As a general rule, courts apply the same rules of construction to municipal ordinances as they do to State statutes. 62 C.J.S. Municipal Corporations § 442. Thus all ordinances and statutes relating to the same subject matter are to be construed together so as to harmonize them, if possible, and give full force and effect to true legislative intent." City of Minot v. Central Ave. News, Inc., 308 N.W.2d 851, 862 (N.D. 1981). Section 4-150 of The Zoning Ordinance of the City of West Fargo, North Dakota, provides "(w)henever the requirements of this Ordinance are at variance with the requirements of any other lawfully adopted rules, regulations, ordinances, deed restrictions, or covenants, the most restrictive or that imposing the higher standards, shall govern." It makes no difference if a definition is found within the subdivision ordinances or the zoning ordinances; they are construed together so as to harmonize them, if possible, and give full force and effect to true legislative intent – the

ordinance's standards dictate a result making LANDOWNER'S property non-compliant justifying presentation of severance damages.

[¶76] CITY'S Section 4-0402.2, entitled "DEFINITIONS", has a definition for "Right-of-Way that is especially pertinent to this discussion:

> Right-of-Way - A strip of land acquired by reservation, dedication, forced dedication, prescription or condemnation and intended to be occupied or occupied by a road, crosswalk, railroad, electric transmission lines, oil or gas pipeline, waterline, sanitary sewers and other similar uses. See Figure 2.

Figure 2 is also attached for the Court's ease of examination. App., ps. 188.

[¶77] There already exists a township road within the forty (40') foot wide temporary construction easement. Presumptively, the congressional section line easement only allowing for public access along the south thirty-three (33') feet of Landowner's property still exists. N.D.C.C. § 24-07-03.[3] By ordinance definition, the City of West Fargo always includes sanitary sewer easements as being part of the "right-of-way", a term having significant legal meaning when determining compliance with West Fargo's ordinances, particularly with respect to setbacks, because right-of-way boundaries can become points of measurement to determine set-backs (and possibly, the starting point when determining the most restrictive).

[¶78] LANDOWNER'S property is Zoned as "A" District or Agricultural District, and the requirements are set forth in Section 4-421. App., ps. 191-194. The "Yard Requirements" set forth in Section 4-421.4, existing at the time of taking LANDOWNER'S land, include subsection f's specified "Minimum Front Yard" along with a footnote #2 indicating definite

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[3] 19th Avenue North does not follow the section line as is evident on Exhibit A. App., p. 183. Instead, its traveled path runs parallel but south of the section line, which is the southern boundary of LANDOWNER'S property.

words of instruction – "Whichever requires the greater setback.":

f.	Minimum Front Yard: -	Local: 120' from centerline or 40' from the established right-of-way, whichever is greater.
	-	Collector: 150' from centerline or 75' from the established right-of-way, whichever is greater.
	-	Arterial: 150' from centerline or 75' from the established right-of-way, whichever is greater.

[¶79] Put another way, CITY legally defines right-of-way to include not only roads, but also any acquired easements for "sanitary sewers" (among several other things). For 19th Avenue North – a minor arterial road, CITY'S ordinance(s) require the **greater distance** of 150' from the centerline[4] OR 75' from the established right-of-way (which always includes this sanitary sewer easement which is located 75' north of the property boundary). Due to the mandated rule of interpretation always requiring **the greater distance** to control, LANDOWNER'S real property must have a minimum front yard of 150' (75' measured from the north right-of-way line for the sanitary sewer easement; and possibly 207.5' under the calculations in Footnote 4 using an easement centerline) – which always makes LANDOWNER'S personal residence now noncompliant, and incapable of being repaired, or re-built. LANDOWNER is entitled to severance damages due to the diminished value of his property, now non-compliant with CITY'S zoning and building laws. LANDOWNER is entitled to present his theory of damages to the jury – the correct trier of fact.

[¶80] Unfortunately, the lower court looked to the CITY for guidance on ordinance

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[4] There does exist an ambiguity; while the centerline may relate to the road, but it could also relate to the centerline of any easement. If so, the measurement would be 150' north from a point at the center of the 35' easement (1/2 of 35 = 17.5; 40' + 17.5' + 150' = 207.5' from southern boundary of Landowner's property.

interpretation. The CITY looked at the definition of "Yard, Front",[5] and suggested "landowner has ignored the Front Yard definition in the zoning regulations to such an extent his response brief says, "The front lot line is irrelevant. (citation omitted) It is exactly these types of misstatements of law that make it necessary to bring this Supplemental Motion in Limine." App., p. 256. The lower court erred in accepting CITY'S guidance because the "front lot line is **always** irrelevant" under the definitions found in Chapter 4-200 – the "front lot line" is the same as LANDOWNER'S **property** line. LANDOWNER'S **property** line never changes; however, the adequacy of the "Yard, Front" is determined by the "Minimum Front Yard" set forth in Section 4-421.4(f) [App., p. 194] which establishes new criteria depending on the nature of the road, in this case: "Arterial: 150' from centerline or 75' from the established right-of-way, whichever is greater." The lower court correctly identifies the applicability of Section 4-421.4(f), but ignores its actual words of limitation. There is no ambiguity about the definition of "Yard, Front", as first suggested by the CITY, and the lower court's decision which pre-supposes only using the road right of way, but there may be four (4) different questions based upon the starting point of measurement, with only one (1) correct answer based upon "whichever is greater": (A) "150' from centerline (of street)", (B) "150' from centerline (of easement)"; (C) "75' from the established right-of-way (of street)", or (D) "75' from the established right-of-way (of easement)"? App., p. 194. The

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[5] YARD, FRONT: A yard extending across the front of a lot between the side lot lines and extending from the front lot line to the front of the principal building or any projections thereof. The Front Yard shall be facing a public street. ..." Chapter 4-200. Definitions. Doc. ID #160.

lower court errs by adding "missing" word(s) - "the particular established right-of-way related to the arterial road". App., p. 260. Even if "road right-of-way" is correct – CITY'S past taking of the south 75' *because of the future street* [and incredibly, there is no time constraint on the duration of the temporary construction easement except as ordered by the court] establishes LANDOWNER'S property is non-compliant, *or soon will be in the eyes of every prospective purchaser*. If ambiguity exist, "right of way" is the term to be defined by CITY'S other referenced statute which would always include sanitary sewer easement(s) as a matter of CITY'S law.

[¶81] When the term "right of way" has been defined by CITY to include easements for "sanitary sewers" [App., p. 188], among several other things, and Judge McCullough has approved the taking of only the right of way – the northern boundary of the easement area always triggers the starting point for a 75' measurement. The term "right-of-way" in the ordinance has been defined within CITY'S ordinances for at least setback purposes. If an ordinance's language is clear and unambiguous, the legislative intent is presumed clear on the face of the ordinance, paraphrasing the Supreme Court in Northern X-Ray Co., Inc. v. State By and Through Hanson, 542 N.W.2d 733, 735 (N.D. 1996). If an ordinance's language is ambiguous, then you look to "extrinsic aids" in interpreting the statute – in this case, CITY'S actual definition for right of way, which always includes sanitary sewer easements, found in the same Title IV that will be the extrinsic aid. *Id.*, p. 735.

[¶82] When LANDOWNER'S dwelling is only 62.02' north of the easement's north boundary [App., p. 469], LANDOWNER'S property is significantly devalued, and he should

be allowed to present such evidence for a jury determination, just as requested by LANDOWNER exercising a constitutional right to trial by jury, not judge. If 150' from the centerline of the right of way for the easement taken is the correct criteria, even more adverse impact exists. The undersigned will echo CITY'S design engineer's obviously true statement - having a force main, or even a road, in your front yard right near your house devalues the property. LANDOWNER'S right to present his theory of damages was wrongfully taken.

[¶83] The lower court was wrong in interpretation of CITY'S ordinances, and then the error was compounded by limiting LANDOWNER'S evidentiary presentation precluding any reference to the effect of law and location – the road is coming, and the pipe already exists. It will affect the fair market value; the lower court's order should be eliminated so that the jury can determine "just compensation" based upon the facts. The severance damages are real – predicated upon CITY'S own ordinances and CITY'S placement of infrastructure, and future arterial road which substantially depreciates the value of the property. LANDOWNER is entitled to both types of damage – present use, and depreciated value. LANDOWNER is further entitled to separate trespass damages relating to the temporary construction areas – areas not capable of being taken under North Dakota's Constitution.

[¶84] **POINT 3. The lower court invaded the province of the jury.**

[¶85] LANDOWNER was prevented from presenting factual testimony as to the value of his property at two (2) different times – before and after the project so that he may be awarded "just compensation", to include severance damages. See, Point 2. "The determination of damages in an eminent domain action is a question of fact to be decided by

the trier of fact. *Minot Sand & Gravel Co. v. Hjelle,* 231 N.W.2d 716 (N.D.1975)." City of Devils Lake v. Davis, 480 N.W.2d 720, 725 (N.D. 1992). See also, Northern States Power Company by Board of Directors v. Mikkelson, 2020 ND 54, ¶ 12, 940 N.W.2d 308. The jury, not the judge, should determine facts.

[¶86] **CONCLUSION**

[¶87] As to Phase I, the lower court ignored (a) the constitutional constraint on quick take – it is only available for highway/road right of ways, and (b) the statutory constraint limiting such highway/road right of ways to improvements funded by special assessments when landowners simultaneously receive a benefit for the highway/road project (that may include other easements for ancillary services, such as underground sewer). Never are temporary construction easements allowed to be taken by quick take. As to Phase II, the lower court decimated LANDOWNER'S jury presentation, and common sense, by legally determining evidence as to the existence of the highway/road right of way easement, and its impact on fair market value, could not be presented to the jury as a matter of law. It should have been the jury determining if "(H)aving a force main in somebody's front yard right near their house devalue(s) it .." – not the judge.

Respectfully submitted this 30th day of December , 2021 .

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/s/ Jonathan T. Garaas
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The above-signed attorney certifies, pursuant to N.D.R.App.P. 32(e), that the Appellant's Brief consisting of thirty-nine (39) pages (counting this page) complies with the thirty-eight (38) page limitation imposed by N.D.R.App.P. 32(a)(8)(A) for principal briefs.

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

City of West Fargo, a political subdivision of the State of North Dakota,

Plaintiff-Appellee

vs.

Mark Alexander McAllister; Alerus Financial, N.A.; and all other persons unknown claiming an estate or interest in or lien or encumbrance upon the real property described in the Complaint, whether as heirs, legatees, devisees, personal representatives, creditors or otherwise,

Defendant-Appellant.

Supreme Court No. 20210360

Affidavit Of Service By Electronic Means

Civil No. 09-2018-CV-02940
(Cass County District Court)

State of North Dakota
County of Cass

[¶1] Jonathan T. Garaas, being first duly sworn on oath, deposes and says that Affiant is a resident of the City of Fargo, North Dakota, and over the age of eighteen years, and not a party to the above entitled matter.

[¶2] On the 30th day of December, 2021, Affiant electronically served a true and correct copy of the following document(s) in the above entitled action: **(1) Appellant's Brief; and (2) Appellent's Appendix**.

[¶3] The electronically attached documents were served upon the identified lawyer as follows:

[¶4] Christopher M. McShane at cmcshsane@ohnstadlaw.com

[¶5] Copies of the same documents [Brief & only first four (4) pages of Appendix] were simultaneously mailed to:

Alerus Financial, N.A.
Jerrod Hanson, Registered Agent
401 Demers Avenue
Grand Forks, North Dakota 58201

[¶6] To the best of Affiant's knowledge, the electronic address above given was the actual electronic mailing address, or post office address of the party intended to be so served. The above documents were duly e-mailed or mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure, as revised by other rules.

/s/ Jonathan T. Garaas

_____
Jonathan T. Garaas

Subscribed and sworn to before me this the 30th day of December, 2021.

/s/ David Garaas & Seal

_____
Notary Public